



This document is scheduled to be published in the Federal Register on 01/29/2014 and available online at <http://federalregister.gov/a/2014-01276>, and on [FDsys.gov](http://FDsys.gov)

(Billing Code 5001-06)

**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 202, 207, 209, 216, and 234**

**RIN 0750-AI16**

**Defense Federal Acquisition Regulation Supplement: Limitation on Use of Cost-reimbursement Line Items (DFARS Case 2013-D016)**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD)

**ACTION:** Interim rule.

**SUMMARY:** DoD is issuing an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2013, which prohibits DoD from entering into cost-type contracts for production of major defense acquisition programs.

**DATES:** Effective [Insert date of publication in the **FEDERAL REGISTER**].

Comment Date: Comments on the interim rule should be submitted in writing to the address shown below on or before [Insert 60 days after publication in the **FEDERAL REGISTER**] to be considered in the formation of the final rule.

**ADDRESSES:** Submit comments identified by DFARS Case 2013-D016 by any of the following methods:

o Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2013-D016" under the heading "Enter Keyword or ID" and selecting "Search". Select the link "Submit a Comment" that corresponds with "DFARS Case 2013-D016". Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2013-D016" on your attached document.

o Email: [dfars@mail.mil](mailto:dfars@mail.mil). Include DFARS Case 2013-D016 in the subject line of the message.

o Fax: 202-501-4067.

o Mail: Defense Acquisition Regulations System, ATTN: Susan Williams, OUSD/AT&L/DPAP/DARS, 3060 Defense Pentagon, Room 3B855, Washington, D.C. 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check <http://www.regulations.gov> approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

**FOR FURTHER INFORMATION CONTACT:** Ms. Susan Williams, Senior Procurement Analyst, Defense Acquisition Regulations System, ATTN: Lesa Scott, OUSD/AT&L/DPAP/DARS, 3060 Defense Pentagon, Room 3B855, Washington, D.C. 20301-3060, telephone 571-372-6092.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

This interim rule amends the DFARS to implement section 811 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112-239), which was enacted January 2, 2013. Section 811(a) requires DoD to modify the acquisition regulations to prohibit DoD from entering into cost-type contracts for the production of major defense acquisition programs (MDAPS) for contracts entered into on or after October 1, 2014, with one exception in section 811(b). Under section 811(b), the Under Secretary of Defense for Acquisition, Technology, and Logistics may submit to the congressional defense committees: (1) A written certification that the particular cost-type contract is needed to provide a required capability in a timely, cost-effective manner; and (2) An explanation of the steps taken to ensure that the use of cost-type pricing is limited to only those line items or portions of the contract where such pricing is needed to achieve the purpose of the exception.

In implementing section 811 of the NDAA for FY 2013, DoD further defined the prohibition on entering into cost-type contracts to explicitly state the prohibition also applies to entering into cost-reimbursement line items for the production of MDAPS.

## **II. Discussion and Analysis.**

This interim rule makes the following changes to the DFARS:

- The definition for "major defense acquisition program" is added to section 201.101, Definitions, and is removed from section 209.571-1, Definitions.
- Section 207.106(b)(1)(S-74) adds a cross-reference to see section 234.004, Acquisition Strategy, when selecting contract type.
- A new policy statement is added at section 216.102, Policies.
- A new definition of "production of major defense acquisition program" is added to section 234.001.
- Section 234.004, Acquisition Strategy, paragraph (2) is revised and reformatted.

## **III. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory

action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

#### **IV. Regulatory Flexibility Act**

DoD does not expect this interim rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

This interim rule implements section 811 of the National Defense Authorization Act for Fiscal Year 2013. Small entities are not expected to be directly affected by this rule as it establishes policy and sets parameters for DoD contracting officers concerning selection of appropriate contract types when entering into contracts for the production of major defense acquisition programs (MDAPS). Cost-type contracts and cost-reimbursement line items may not be employed for production of MDAPS on or after October 1, 2014. Generally, small entities are not involved as prime contractors in the production of MDAPS due to the complex nature of these contracts and the associated requirement to employ extensive business and management systems.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small

entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 601. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2013-D016) in correspondence.

## **V. Paperwork Reduction Act**

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

## **VI. Determination to Issue an Interim Rule**

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This interim rule implements section 811 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239). Section 811(a) instructs DoD to modify the acquisition regulations to prohibit DoD from entering into cost-type contracts for the production of major defense acquisition programs (MDAPS) for contracts entered into on or after October 1, 2014, with one exception in section 811(b). Under section 811(b), the Under Secretary of Defense for Acquisition, Technology, and Logistics may submit to the congressional

defense committees: (1) A written certification that the particular cost-type contract is needed to provide a required capability in a timely, cost-effective manner; and (2) An explanation of the steps taken to ensure that the use of cost-type pricing is limited to only those line items or portions of the contract where such pricing is needed to achieve the purpose of the exception. If implementation is delayed, contracting officers and program managers may be unaware of the prohibition on using cost-type contracts or cost-reimbursement line items for production of MDAPS on or after October 1, 2014, and, as a consequence, unable to perform appropriate acquisition planning to select a contract type that complies with the law. Failure to implement this rule in a timely manner may further harm the Government, because award of a cost-type contract for production of MDAPS, at this phase in the acquisition cycle, would inappropriately shift the responsibility for performance cost risk from the contractor to the Government. However, pursuant to 41 U.S.C. 1707 and FAR 1.501-3(b), DoD will consider public comments received in response to this interim rule in the formation of the final rule.

**List of Subjects in 48 CFR Parts 202, 207, 209, 216, and 234**

Government procurement.

**Manuel Quinones,**

*Editor, Defense Acquisition Regulations System.*

Therefore, 48 CFR parts 202, 207, 209, 216, and 234 are amended as follows:

1. The authority citation for 48 CFR parts 202, 207, 209, 216, and 234 continues to read as follows:

**Authority:** 41 U.S.C. 1303 and 48 CFR Chapter 1.

#### **PART 202-DEFINITIONS OF WORDS AND TERMS**

2. Amend section 202.101 by adding, in alphabetical order, the definition of "Major defense acquisition program" to read as follows:

##### **202.101 Definitions.**

\* \* \* \* \*

Major defense acquisition program is defined in 10.U.S.C. 2430(a).

\* \* \* \* \*

#### **PART 207-ACQUISITION PLANNING**

3. Amend section 207.106 by adding paragraph (S-74) to read as follows:

##### **207.106 Additional requirements for major systems.**

\* \* \* \* \*

(S-74) When selecting contract type, see 234.004 (section 811 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239)).

#### **PART 209-CONTRACTOR QUALIFICATIONS**



## **209.571-1 Definitions [Amended]**

4. Amend section 209.571-1 by removing “Major Defense Acquisition Program” is defined in 10 U.S.C. 2430.”

## **PART 216-TYPES OF CONTRACTS**

5. Add section 216.102 to read as follows:

### **216.102 Policies.**

In accordance with section 811 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239), use of any cost-reimbursement line item for the acquisition of production of major defense acquisition programs is prohibited unless the exception at 234.004(2)(ii) applies.

## **PART 234-MAJOR SYSTEM ACQUISITION**

6. Amend section 234.001 by-

- a. Revising the section heading; and
- b. Adding, in alphabetical order, the definition for “Production of major defense acquisition program”.

The revision and addition read as follows:

### **234.001 Definitions.**

\* \* \* \* \*

Production of major defense acquisition program means the production and deployment of a major system that is intended to achieve an operational capability that satisfies mission needs, or an activity otherwise defined as Milestone C under Department of Defense Instruction 5000.02 or related authorities.

\* \* \* \* \*

7. Section 234.004 is amended by revising paragraph (2) to read as follows:

**234.004 Acquisition strategy.**

\* \* \* \* \*

(2) Contract type.

(i) In accordance with section 818 of the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109-364), for major defense acquisition programs at Milestone B—

(A) The Milestone Decision Authority shall select, with the advice of the contracting officer, the contract type for a development program at the time of Milestone B approval or, in the case of a space program, Key Decision Point B approval;

(B) The basis for the contract type selection shall be documented in the acquisition strategy. The documentation—

(1) Shall include an explanation of the level of program risk; and

(2) If program risk is determined to be high, shall outline the steps taken to reduce program risk and the reasons for proceeding with Milestone B approval despite the high level of program risk; and

(C) If a cost-type reimbursement contract is selected, the contract file shall include the Milestone Decision Authority's written determination that—

(1) The program is so complex and technically challenging that it would not be practicable to reduce program risk to a level that would permit the use of a fixed-price type contract; and

(2) The complexity and technical challenge of the program is not the result of a failure to meet the requirements of 10 U.S.C. 2366a.

(ii) In accordance with section 811 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239), for contracts entered into on or after October 1, 2014, the contracting officer shall—

(A) Not use cost-reimbursement line items for the acquisition of production of major defense acquisition programs, unless USD(AT&L) submits to the congressional defense committees—

(1) A written certification that the particular cost-reimbursement line items are needed to provide a required capability in a timely and cost effective manner; and

(2) An explanation of the steps taken to ensure that cost-reimbursement line items are used only when to achieve the purposes of the exception; and

(B) Include a copy of such congressional certification in the contract file.

8. Add section 234.005 heading to read as follows:

**234.005 General requirements.**

[FR Doc. 2014-01276 Filed 01/28/2014 at 8:45 am; Publication  
Date: 01/29/2014]